

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

FILED/ACCEPTED

SEP 2 9 2009

In the Matter of)	3EF 2 9 2009
700 MHz MOBILE EQUIPMENT))	Federal Communications Commission Office of the Secretary
CAPABILITY)	RM
)	
Petition for Rulemaking Regarding)	
the Need for 700 MHz Mobile Equipment)	
to be Capable of Operating on All Paired)	
Commercial 700 MHz Frequency Blocks)	
To: The Commission		

PETITION FOR RULEMAKING REGARDING THE NEED FOR 700 MHZ MOBILE EQUIPMENT TO BE CAPABLE OF OPERATING ON ALL PAIRED COMMERCIAL 700 MHZ FREQUENCY BLOCKS

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SUMMARY

The 700 MHz Block A Good Faith Purchasers Alliance (the "Alliance") respectfully requests that the Commission immediately initiate a rulemaking to assure that consumers have reasonable access to all paired commercial 700 MHz frequency blocks that the Commission licenses, and to adopt rules that prohibit restrictive mobile equipment banding arrangements that are contrary to the public interest. While the rulemaking process unfolds, the Commission should suspend equipment authorization for all 700 MHz mobile equipment unless it is capable of operating on all paired commercial 700 MHz frequency blocks.

Over the last several years, the Commission has conducted a series of auctions involving the licensing of 700 MHz spectrum. Initially, small businesses dominated the 700 MHz auctions, due likely to the risks inherent in the process and the number of other spectrum options available to larger carriers. All of that changed by the time the Commission conducted its \$20 Billion dollar Auction No. 73. In that auction, the nation's two largest wireless carriers acquired the vast majority of 700 MHz spectrum that was auctioned. Moreover, during the course of several 700 MHz auctions, a number of significant secondary market transactions also transpired that, when combined with the most recent 700 MHz auction activity, led to the two largest wireless carriers emerging as the dominant 700 MHz licensees of commercial paired spectrum. Specifically, as a result of these two factors AT&T Wireless, Inc. ("AT&T") and Cellco Partnership d/b/a Verizon Wireless ("VZW"), together with their affiliates, hold the vast majority of paired commercial 700 MHz licenses based upon MHz/pops.

Meanwhile, the LTE Standards Group, 3GPP, ("3GPP") has begun to issue equipment specifications. In its Release No. 8, 3GPP established a "Band Class 12" which includes all paired Lower 700 MHz blocks, *i.e.*, Blocks A, B and C. At or about the same time, a "Band Class 14" was established to identify the Public Safety portion of the Upper 700 MHz Band. And, reportedly at the behest of AT&T, as the holder of only Lower 700 MHz Band Block B and C licenses, a "Band Class 17" was created to cover only Blocks B and C in the Lower 700 MHz Band. A "Band Class 13", which accommodates only Upper Band 700 MHz Block C spectrum, was established for equipment useful only to VZW as the holder of regional licenses covering the entire continental United States. The chart below depicts the Band Classes established by 3GPP as of this date:

BAND CLASS	EQUIPMENT CAN BE USED IN:
12	Lower A Block Lower B Block Lower C Block
13	Upper C Block
14	Upper Band Public Safety Allocation
17	Lower B Block Lower C Block

As a result of all of the above, one of the largest carriers is believed to be issuing Requests for Proposals ("RFPs") that specify only equipment capable of operating only over Lower Band 700 MHz Blocks B and C; and the other of the largest carriers is believed to be issuing RFPs specifying only Band Class 13, i.e., Upper Band 700 MHz Block C. As a result, consumers and smaller carriers that acquired Lower Band 700 MHz Block A spectrum are left without viable and widely useful equipment options.

Specifically, (1) Block A licensees will be left without an equipment option that allows them to provide meaningful roaming for their own customers or for customers of AT&T or VZW; (2) in rural areas, in the foreseeable future, there will be virtually no 700 MHz mobile service, as the largest carriers pursue their traditional strategy of focusing on the more populated and financially rewarding large metropolitan areas; (3) Designated Entities ("DE's") and other small carriers that acquired Block A spectrum in FCC auctions will not be able to fully utilize that spectrum and, at the same time, the remerging wireless duopoly will be significantly strengthened.

The above situation violates several provisions of the Communications Act. It contravenes the Commission's Section 1 obligation to make communications available, so far as possible, "to all the people of the United States"; it violates the Section 201(b) prohibition against unreasonable practices; it violates the Section 202(a) prohibition against unreasonable discrimination on the basis of . . . "locality"; it fails to comply with the Section 254(b)(3) universal service requirement that customers in all areas of the country have access to reasonably comparable telecommunications services; and it violates the Section 307 directive that rules be formulated to provide an equitable distribution of radio service to all states.

When faced with this type of issue before, the Commission did the right thing, and it should do so again now. Specifically, when the Commission first licensed spectrum for cellular service, it required that all mobile units for that band be capable of operating over all frequencies in the band. The Commission should take the same action here. In addition, and consistent with that requirement, it should suspend immediately

the authorization of any equipment not capable of operating over all paired commercial 700 MHz band spectrum.

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To: The Commission

PETITION FOR RULEMAKING REGARDING THE NEED FOR 700 MHz MOBILE EQUIPMENT TO BE CAPABLE OF OPERATING ON ALL PAIRED COMMERCIAL 700 MHz FREQUENCY BLOCKS

Pursuant to Sections 1, 4(i), 201(b), 202(a), 303(r) and 307(b) of the Communications Act (the "Act"), 47 U.S.C. §§ 151, 154(i), 201(b), 202(a), 303(r), and 307(b), and Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401, the 700 MHz Block A Good Faith Purchasers Alliance (the "Alliance"), by counsel, hereby petitions the Commission to initiate a rulemaking to assure that consumers will have access to all paired 700 MHz spectrum that the Commission licenses, to act so that the entire 700 MHz band will develop in a competitive fashion, and to adopt rules that prohibit restrictive equipment arrangements that are contrary to the public interest. The Alliance also requests that the Commission impose an immediate freeze on the authorization of

¹ The Alliance is a joint venture consisting of Cellular South Licenses, Inc.; Cavalier Wireless, LLC; Continuum 700, LLC; and King Street Wireless, L.P., each of which was the high bidder for and/or currently the licensee of Lower 700 MHz Band Block A spectrum.

mobile equipment that is not capable of operation on all paired commercial 700 MHz frequencies.

I. THE ISSUE

The nation's two largest wireless carriers are collaborating with 3GPP to establish self-serving "band classes" for 700 MHz mobile equipment. In addition, there are reports that RFPs have been issued by AT&T and VZW ("the Big 2") to manufacturers that will allow the Big 2, and only them, to have economic and near term access to 700 MHz equipment. Moreover, that equipment will preclude their customers from the opportunity to roam and make use of the Lower Block A spectrum purchased by members of the Alliance (as well as spectrum licensed to other Lower Block A licensees). At the same time the bulk purchasing power of the Big 2 will virtually assure that equipment needed by Block A licensees in smaller volumes will be available only later in time and at considerably higher price points.

Over the last several years, the Commission has conducted a series of auctions involving the licensing of 700 MHz spectrum. Initially, small businesses dominated these auctions, due likely to the risks inherent in the process and the number of other spectrum options available to larger carriers. All of that changed by the time the Commission conducted its \$20 Billion dollar Auction No. 73. In that auction, the nation's two largest wireless carriers acquired the vast majority of the 700 MHz spectrum that was auctioned. Moreover, during the course of several 700 MHz auctions, a number of significant secondary market transactions also transpired that, when combined with the most recent 700 MHz auction activity, led to the two wireless carriers emerging as the dominant 700 MHz licensees of commercial paired spectrum. As a result of these two

factors AT&T and VZW, together with their affiliates, hold the vast majority of paired commercial 700 MHz licenses based upon MHz/pops.

Meanwhile, 3GPP began to issue equipment specifications. In its Release No. 8, 3GPP established a "Band Class 12" which includes all paired Lower 700 MHz Bands, i.e., Blocks A, B and C. At or about the same time, a "Band Class 14" was established to identify the Public Safety portion of the Upper 700 MHz Band. And, reportedly at the behest of AT&T, as the holder of only Lower 700 MHz Band Block B and C licenses, a "Band Class 17" was created to cover only Blocks B and C in the Lower 700 MHz Band. A "Band Class 13", which accommodates only Upper Band 700 MHz Block C spectrum, was established for equipment useful to VZW as the holder of regional licenses covering the entire continental United States. The chart below depicts the Band Classes established by 3GPP as of this date:

BAND CLASS	EQUIPMENT CAN BE USED IN:
12	Lower A Block Lower B Block Lower C Block
13	Upper C Block
14	Upper Band Public Safety Allocation
17	Lower B Block Lower C Block

As a result of all of the above, one of the largest carriers is believed to be issuing Requests for Proposals ("RFPs") that specify only equipment capable of operating only over Lower Band 700 MHz Blocks B and C; and the other of the largest carriers is believed to be issuing RFPs specifying only Band Class 13, *i.e.*, Upper Band 700 MHz Block C. Meanwhile, consumers and smaller carriers that acquired Lower Band 700 MHz Block A spectrum are left without viable equipment options.

These equipment design and procurement practices contravene the public interest, whether viewed from the perspective of consumers or competing carriers. From a consumer point of view, the ramifications are disastrous. If AT&T or VZW customers seek to roam when leaving their home market, they will not have the ability to utilize the Block A systems of the small and regional carriers that are licensed for Block A. For the Block A carriers, there will be a loss of roaming service revenue that has severe competition implications and will impact greatly their ability to construct systems in rural areas. Holding aside roaming for the moment, only the same two largest carriers will get early access to equipment, and only those carriers will have access to the full array of applications and reasonable pricing that comes with volume.

Consumers living in rural areas are among the hardest hit by the artificial limitations on product availability that is being engineered by the nation's largest carriers. Oftentimes, the Big 2 carriers chose not even to offer service in rural areas, instead electing to operate only in the more high density (and thus profitable) portions of markets, leaving largely unserved the more rural areas. In any event, given the time-proven tendency of the largest carriers to move only gingerly, if at all, into rural areas, in many cases rural consumers will not even have the option of receiving service from both a Big 2 carrier and a Lower Band Block A carrier, and using the same equipment in order to have the opportunity to roam. Thus, they will be denied access to many of the benefits 700 MHz. So, ironically, those living in rural areas where the benefits of 700 MHz service are most eagerly awaited (due to superior propagation for distance and penetration) are the ones least likely to have access to that spectrum.

In developing rules for licensing the Lower 700 MHz Band the Commission intended to "...promote access to spectrum and the provision of service, especially in

rural areas" by replacing the previous "substantial service" requirements "...with significantly more stringent performance requirements." The Commission went on to adopt comparatively aggressive geographic-based performance requirements for licensees in the CMAs (i.e, Block B) and the Economic Areas (i.e., Block A). The Commission's best intentions, and the willingness of Block A bidders to accept those ambitious construction obligations, are about to be frustrated by an unnecessarily restrictive plan by the Big 2 and 3GPP to develop 700 MHz mobile devices with capabilities that do not include Lower Block A. Without Commission action that assures inclusion of Block A spectrum in mobile equipment there will be no affordable mobile equipment useful for that spectrum and no business case for Block A licensees to invest in facilities to serve the rural areas.

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Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; and Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, Second Report and Order, 22 FCC Rcd 15289, 15348 (para. 153) (2007) ("700 MHz Second Report and Order").

For licenses based on CMAs and EAs, licensees must provide signal coverage and offer service to: (1) at least 35 percent of the geographic area of their license within four years of the end of the DTV transition, and (2) at least 70 percent of the geographic area of their license at the end of the license term. In determining the relevant geographic area, we conclude that, in applying geographic benchmarks, we should not generally consider the relevant area of service to include government lands. CMA or EA licensees that fail to meet the interim requirement within their license areas will have their license terms reduced by two years, from ten to eight years, thus requiring these licensees to meet the end-of-term benchmark at an accelerated schedule. For those CMAs or EAs in which the end-of-term performance requirements have not been met, the unused portion of the license will terminate automatically without Commission action and will become available for reassignment by the Commission subject to the "keep-what-you-use" rules. 700 MHz Second Report and Order, 22 FCC Rcd at 15349 (para. 157).

Consumers lose in another, less direct way. Competing carriers will not be able to compete effectively, for several reasons. As discussed above, they will not be able to offer their customers an ability to roam broadly, and thus, will not be able to compete effectively for customers. In fact, they will not have any access to 700 MHz equipment until long after the Big 2 have it. By that time, the Big 2 will have had a "headstart" and will have picked off the "best" 700 MHz customers, thereby making it even more difficult for smaller carriers to compete with the Big 2. And if all of this were not enough, there is the issue of equipment capabilities. As new and enhanced capabilities become available, unless the Commission acts, they will first go to volume customers, and only later to smaller carriers.

These anti-competitive developments were not wholly unexpected. Some competitive concerns were expressed by Commissioners in connection with the Commission's prior decisions for the utilization of 700 MHz spectrum.⁵ Commissioner Copps, in criticizing the decision not to use a wholesale carrier model to encourage competitive entry, noted that

"we have seen a wave of consolidation among wireless incumbents that has substantially increased the hurdles facing potential new entrants. And

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⁴ See <u>Cellular Communications Systems</u>, 86 FCC 2nd 469, n. 57, (1981); aff'd, 89 FCC 2nd 58, n. 32 (1982) where the Commission has acknowledged the problems raised by a headstart and the need for the Commission to address such problems.

Scompetitive issues raised by impediments to the utilization of Lower 700 MHz Band A Block spectrum are also discussed by Cellular South in its Comments regarding the Commission's Notice of Inquiry concerning mobile wireless competitive market conditions, which are being filed in WT Docket No. 09-66 contemporaneously with these Comments. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services, WT Docket No. 09-66, Notice of Inquiry. FCC 09-67, rel. Aug. 27, 2009. See also Cellular South's Comments in response to the Notice of Inquiry on Fostering Innovation and Investment in the Wireless Communications Market, GN Docket No. 09-157, A National Broadband Plan for Our Future, GN Docket No. 09-51, FCC 09-66, rel. Aug. 27, 2009

now we live in a world where the two leading wireless companies are owned in whole or in part by the leading wireline telephone companies."

Commissioner McDowell added a pointed criticism that reflected his concerns about how spectrum would be controlled and utilized in the Lower 700 MHz Band:

[T]he encumbered spectrum structure [for the Upper 700 MHz Band] supported by the majority will force large wealthy bidders away from the Upper Band and into the smaller, unencumbered blocks in the Lower Band. Smaller players, especially rural companies, will be unable to match the higher bids of the well-funded giants. Depriving the nascent 700 MHz market place of smaller new entrants will result in less innovation and competition, not more. Consumers could be short-changed as a result. And it is small new entrants that should be as important to this equation as large new entrants.⁷

II. RESTRICTIVE EQUIPMENT PRACTICES VIOLATE NUMEROUS PROVISIONS OF THE COMMUNICATIONS ACT

Wireless carriers are clearly subject to Sections 201 and 202 of the Communications Act. Section 201(b) prohibits unjust or unreasonable practices for or in connection with communication service and declares that any practice that is unjust or unreasonable is unlawful. 47 U.S.C. § 201(b). Similarly, Section 202(a) of the Act, 47 U.S.C. § 202(b), provides that:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in the charges, practices, classifications,

⁶ Id. at 15562 (Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part)

⁷ *Id.* at 15572 (Statement of Commissioner Robert M. McDowell, Approving in Part, Dissenting in Part).

⁸ Section 332(c)(1)(A) provides that a "person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." See 47 U.S.C. § 332(c)(1)(A). See also Personal Communications Industry Association's Broadband Personal Communications Services, Alliance's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, 16865-66, ¶¶ 15-18 (rel., July 2, 1998) (noting that Section 201 and 202 codify "the bedrock consumer protection obligations" and that their existence "gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance." The Commission has also made clear that the "bedrock consumer protection obligations" of Section 201 and 202 apply "even when competition exists in a market." Id. at 16865, ¶¶ 15, 17.

regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, **or locality**, or to subject any particular person, class of persons, **or locality** to any undue or unreasonable prejudice or disadvantage. (emphasis added).

The restrictive equipment arrangements discussed above and being engineered by the two largest wireless carriers, in collaboration with certain manufacturers, are unjustly discriminatory and anticompetitive. Absent these arrangements, consumers and carriers other than the Big 2 would have genuine access to 700 MHz equipment, sooner, with fewer conditions, and at lower prices than would be possible were the restrictive provisions allowed to remain in place. The discrimination extends both to those who have to pay higher prices for handsets and services and accessories that complement these handsets ⁹ and to consumers in rural areas who would not have access to the benefits of these unique and revolutionary products, all in clear violation of Sections 201(b) and 202(a) are also harmed.

The discriminatory conduct is also in conflict with universal service principles set forth in Section 254(b)(3) of the Act, requiring the Commission to base policies for the preservation and advancement of universal service, in part, on ensuring that consumers in all regions of the U.S. have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas.¹⁰ Clearly, the

⁹ Consumers may also be required to change carriers because their current service provider does not offer their desired phone.

¹⁰ Section 254(b)(3) states that "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3).

Communications Act demands that the Commission rectify the ongoing public harms caused by these restrictive equipment arrangements.

In enacting Section 1 of the Communications Act, Congress made clear its intention that service equity across the United States is a priority. Section 1 of the Act tasks the Commission with regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. Similarly, Section 307(b) of the Act directs the Commission to develop rules with the goal of providing "a fair, efficient, and equitable distribution of radio service" to all states. To that end, the Commission has repeatedly stated that it is committed to establishing policies and rules that will promote telecommunications service to all regions in the United States, particularly to traditionally underserved areas and, as discussed *infra*, has repeatedly taken action to fulfill this commitment. The nation's collusive conduct of the two largest wireless carriers is at odds with both Section 1 and Section 307.

^{11 47} U.S.C. § 151 (emphasis added).

¹² See e.g., The Establishment of Policies and Service rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Bands, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 8842, ¶ 47 (2005) ("BSS Report and Order").

III. THE COMMISSION HAS A HISTORY OF PROHIBITING RESTRICTIVE EQUIPMENT ARRANGEMENTS THAT ARE CONTRARY TO THE PUBLIC INTEREST, AND SHOULD DO SO HERE

This is not the first time that the Commission has been faced with this type of problem. In fact, when the Commission first licensed advanced wireless systems in the early 1980's, it was faced with a very similar issue. At that time, the Commission had just determined to license two separate cellular systems in each market and had to address the issue of how to maintain a competitive market structure. There it wisely decided that all mobile stations to be authorized must be capable of operating over the entire allocated band, stating that:

"With respect to mobile stations, all units must be capable of operating at least over the entire 40 MHz of spectrum (i.e., 666 channels). This is necessary in order to insure full coverage in all markets and capability on a nationwide bases. Cellular Communications Systems, 86 FCC 2d, 469, 482 (1981).

This same obligation was expressly included in the Commission's rules. (Section 22.902(e) read "[A]II mobile units must initially be capable of communicating on the 666 channels specified in paragraphs (b)(1) and (2) of this rule section".)

The Commission also has a track record of prohibiting other restrictive arrangements that become obstacles to competitive access in the telecommunications market. In 2001, the Commission prohibited common carriers from entering into contracts with commercial multiple tenant environment ("MTE") owners that granted to the carriers exclusive access for the provision of telecommunications services to tenants in the MTE.¹³ In 2007, the Commission found that contractual agreements granting one

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¹³ Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and

multichannel video programming distributor exclusive access for the provision of video services to multiple dwelling units ("MDUs") and other real estate developments harm competition and broadband deployment and that any benefits are outweighed by the harms of such agreements. In March 2008, the Commission prohibited carriers from entering into contracts with residential MTE owners that grant carriers exclusive access for the provision of telecommunications services to residents in those MTEs. In each case, the Commission found that the exclusivity arrangements at issue limited consumer choice and competition, contrary to the goals of the I996 Act, and that such arrangements "not only could adversely affect consumers' rates, but also quality [and] innovation..."

Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd. 22983, ¶¶ 160-164 (2000).

¹⁴ Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 07-51, 22 FCC Red. 20235 (2007).

¹⁵ Promotion of Competitive Networks in Local Telecommunications Markets, Report and Order, WT Docket No. 99-217 (rel. Mar. 21, 2008) ("Telecom Nonexclusivity Order").

¹⁶ Telecom Nonexclusivity Order, ¶ 8.

IV. **CONCLUSION**

For all of the foregoing reasons, the Alliance hereby petitions the Commission to

act expeditiously and initiate a rulemaking to assure that consumers will have access to

all 700 MHz spectrum that the Commission licenses, permit the entire 700 MHz band to

develop in a competitive fashion, and prohibit restrictive arrangements that are contrary

to the public interest. The most efficient way in which to accomplish those goals would

be to adopt mobile equipment specifications that parallel those that were adopted at the

onset of cellular licensing. Meanwhile, the Commission should immediately freeze the

equipment authorization process for mobile equipment that would not be capable of

operation on all paired commercial frequency blocks in the Lower and Upper 700 MHz

Bands.

Respectfully submitted,

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